NO. 105

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908

ALFRED DOZIER,
Plaintiff in Error,

vs.

STATE OF ALABAMA,
Defendant in Error.

} In Error to the Supreme Court of Alabama.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

A. D. GASKIN,
Attorney for Plaintiff in Error.

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MAY IT PLEASE THE COURT:

Counsel for defendant in error are mistaken when they say on page 3 of their brief that the "company agreed to deliver the picture, *unframed.*" That is a mistake. The contract shows that the company agreed to deliver the picture *in a frame* (Rec., p. 5). It is as much a part of the contract that the picture shall be placed in a frame as is any other part of the contract.

So that in the case of *Crystal* v. *Mayor* (Ga.), cited by defendant in error, the facts are not like those in the case at bar, because in that case it was argued that "a portrait and its frame were so intimately connected that both constituted a unit or single thing," and the court passed upon that argument by

saying: "This may be quite true after a portrait is placed in a frame." So that the court in that case would have held with the view and contention of plaintiff in error here, had the picture or portrait in that case been contracted to be delivered in a frame as it was in the case at bar.

Again, it may be added that it was as much the duty of the company to deliver the picture framed in an appropriate frame under the contract as it was to have delivered it at all, and surely no one will contend but that the company was under obligations to deliver the picture.

Defendant in error contends that the contract does not provide that the frame was to be manufactured in another state; nor that it was to be made especially for the particular order. But it is a part of the stipulated facts that the company's *factory* is in Chicago, and not in Alabama, and the contract speaks of frames at *factory* prices. The contract also has appropriate blanks for the size of the picture which the customer desires to order, which could be any size that might suit his fancy. Hence, a frame would necessarily have to be made to fit the size ordered. The agreed statement of facts nowhere intimates that the frame is to be made, selected, or fitted in the State of Alabama, but everything contemplates that it was to be done outside of the State of Alabama.

Counsel for defendant in error complain that no authorities were cited in support of the contention that the statute in question Sec. 17 of the Alabama Act violates Sec. I of the 14th amendment to the Con-

stitution, in that it discriminates against the right and privileges of citizens of other states. We thought that this statement was self-evident, that the Constitution was authority enough, but if counsel desire other authorities we would cite them to

Welton v. *Missouri,* 91 U. S., 275.
Walling v. *Michigan,* 116 U. S., 446.
Webber v. *Virginia,* 103 U. S., 344.

All of which cases are exactly in point with the case at bar and establish beyond peradventure that Sec. 17 of the Act of Alabama, is unconstitutional, in that it discriminates against the rights and privileges of citizens of other states.

A comparison of the statutes in the case of *Emert* v. *Missouri,* and *American Steel & Iron Co.* v. *Speed,* relied upon by defendant in error will show the cases and the decisions therein not to be analogous with the case at bar in any regard.

The case of *Emert* v. *Missouri,* 156 U. S., 296, is a case of a peddler going through the country with a buggy and horse, and taking orders for Singer Sewing Machines, but they caught him selling the machine that he had on the wagon.

The statute in question therein is as follows:

> "The statute of Missouri, under which the conviction was had, is contained in a separate chapter of the Revised Statutes of the State, entitled 'Peddlers and their licenses' and relating to no other subject. By this statute, 'whoever shall deal in the selling of' any goods, wares, or merchandise (except books, charts, maps and stationery), 'by going from place to place to sell the same, is declared to be a peddler'; and is prohibited from selling as a peddler without a

license (Rev. Stat. of 1879, 6471, 6472). The license is required to state how the dealing is to be carried on, whether on foot, or with one or more beasts of burden, a cart or wagon, or a boat or vessel; and may be obtained by any person paying the tax prescribed, according to the manner in which the business is carried on (Sec. 6473, 6477). Any person dealing as a peddler, without a license, whether with a pack, a wagon, or a boat, is to pay a certain penalty, which, in the case of peddling in a cart or wagon, is fifty dollars (Sec. 6478). And any peddler who refuses to exhibit his license, on demand of a sheriff, collector, constable, or citizen householder of the county, is to forfeit the sum of ten dollars (Sec. 6479)."

The statute involved in the case of *American Steel & Wire Co.* v. *Speed*, 192 U. S., 500, is as follows:

"Section 28, Art. II., of the constitution of the State of Tennessee, so far as pertinent to the issue to be decided, is as follows:

"'All property, real, personal or mixed, shall be taxed. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the state, shall not be taxed at a rate higher than the *ad valorem* tax on property.'

"Section 30, article II., of the same constitution provides:

"'No article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees.'

"The assessing and taxing laws of the State of Tennessee in force at the time the taxes in controversy were levied provided, first, for a general *ad valorem* tax upon all property; second, for a merchants' tax separate from the general *ad valorem* levy, this latter tax being of two classes: A tax upon the average capital invested in business and a privilege tax, which was at a different rate and in other respects distinct from the merchants' tax just referred to. Moreover, at the time the tax assessments in question were made the statutes of the State of Tennessee concerning the merchants' tax contained the following:

"The term 'mechants' as used in this act, includes all persons, co-partnerships or corporations engaged in trade or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats or other craft stationed or plying in the waters of this state, and confectioners, whether such goods, wares or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered."

From a reading of the foregoing statutes involved in those two cases, it is evident that the decisions therein cannot control the decision in the case at bar. Section 17 of the Alabama Act is obnoxious to article 1, section 8 of the constitution of the United States and also to article 14, section 1 of said constitution, and the judgment in the Supreme Court of Alabama should be reversed.

Respectfully submitted,

A. D. Gash,

Attorney for Plaintiff in Error.

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No. 105.

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October Term, 1909.

ALFRED DOZIER, PLAINTIFF IN ERROR,
vs.
THE STATE OF ALABAMA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

BROWN PRINTING CO., MONTGOMERY, ALA.

IN THE
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BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

The plaintiff in error was arrested on an affidavit charging him with engaging in or carrying on the business of soliciting orders for the enlargement of photographs or of selling or disposing of picture frames without a license and contrary to law. He was tried and convicted in the county court from whence he appealed to the City Court of Montgomery, and he was here again convicted and he then apppealed to the Supreme Court of Alabama where the judgment of conviction was affirmed and this writ of error was sued out to reverse the judgment of conviction.

The prosecution was begun under section 17 of the Act of the Legislature of Alabama, approved March 7, 1907 (Gen. Acts 1907, p. 469), as follows:

"That each person, firm or corporation, either in person or through agents, who solicits orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they make charge for such frames or not; or any person, firm or corporation either in person or through agents who sells or disposes of picture frames shall pay a license tax of twenty-five dollars in each county in which they may do business; but this Act shall not apply to merchants or dealers having a permanent place of business in this State and keeping picture frames as a part or all of their stock in trade."

This Act has since been codified into and now constitutes subdivision 7 A, of section 2361 of the Political Code of Alabama, of 1907.

The cause was tried on an agreed statement of facts from which it appears that at the time the prosecution was begun the defendant was an agent of the Chicago Crayon Company, for the purpose of delivering pictures and frames and collecting the money therefor, the orders for which pictures and frames had previously been taken by other agents of the company; that the company was a corporation of the State of Illinois, and doing business in that State and was engaged in the business at Chicago of making and enlarging portraits and manufacturing frames; and in the prosecution of its business the company had agents traveling in the State of Alabama who solicited orders and the bill of exceptions recites that *such orders were the same as the one attached thereto and marked Exhibit "A" and made a part thereof and were signed by the customer and witnessed by the agent. Upon securing this order the agreement marked Exhibit "B" attached thereto and made a part of the bill was signed by the agent and turned over to the party giving the order and a* duplicate was forwarded to the Company at Chicago; and when the portrait ordered was ready for delivery, a notice was sent to the person who ordered the same and the portrait and

frames were shipped from Chicago to the place where they were to be delivered, consigned to the Company, and that all orders were taken, executed, shipped and delivered in the name of the company, and that the picture frames remained the property of the company until delivered and collected for; and that the defendant since March 7th, 1907, in the County of Montgomery had been engaged in the business of delivering picture frames and collecting therefor as above stated; and that neither the defendant nor the company had a permanent place of business within the State as mentioned in the proviso of section 17 of said act of March 7, 1907, and that the license tax had not been paid.

It appears from Exhibits "A" and "B" attached to the bill of exceptions that the customer was required to order an unframed picture and the company agreed to deliver the picture, unframed. Reference is made in both of the exhibits to the fact that the picture would be delivered in an appropriate frame and that the contract entitled the customer to purchase such frame at the factory price.

We concede that the defendant cannot be convicted for soliciting orders for the enlargement of *pictures* because the taking of the orders therefor and the delivery thereof in pursuance of the order-contract, constituted interstate commerce. But we do insist, and the Supreme Court of Alabama so held, that the sale of the frames was made and completed in Alabama by the agent, after the frames were brought into the State, and while in the possession of the agent and therefore, that the transaction with respect to the frames was not interstate but *intra state* commerce, and that the conviction should be sustained under the latter alternative in the complaint. The question has not been decided by this court. Our contention is supported by the following cases:

State v. Montgomery, 52 Maine 433; 43 Atlantic 13;
Chrystal v. Mayor, etc., 33 S. E. 810.

And see, also,

Machine Company v. Gage, 100 U. S. 676;
Emert v. Mo., 156 U. S. 296;
American Steel & Wire Co. v. Speed, 192 U. S. 500;
Rearick v. Commonwealth of Pa., 203 U. S. 506;
General Oil Co. v. Crane, 209 U. S. 231.

In State v. Montgomery, 52 Maine, 233 supra, the defendant was charged with going about from place to place and carrying for sale and exposing for sale pictures and picture frames. It appeared that the defendant was an employe of the Chicago Portrait Company and the order for the portrait was very much the same as in the case at bar, and contained the statement, "that the picture will be delivered in an appropriate frame, which the customer is advised, but not compelled to buy." At the time of the delivery, the defendant offered frames for sale to those persons who had ordered pictures. The Court said: "We think the case of the defendant was sufficient to constitute the crime of peddling picture frames without a license. He went from place to place in Farmington. He carried these picture frames. He exposed them for sale. * * * The fact that the frames were appropriate for the pictures, which had been ordered or that when the pictures had been delivered, they were encased in the frames, can make no difference. It is the same as if they were exposed separately or at another time. The frames had not been previously ordered. *The customers had made no previous contracts to purchase frames nor had the defendant's employer made any previous contract to sell picture frames. The selling or exposing for sale of picture frames was not incidental to the business of enlarging pictures, but was additional to it.* The defendant had the frames in his possession to expose for sale and then to sell if he could."

In Chrystal v. Mayor (Georgia), 33 S. E. 810, the Supreme Court of Georgia, in an opinion by Lumpkin, P. J., held that the agent of the portrait company was liable to

pay a tax for selling the frames under facts identical with those in the case at bar. The court said: "We have without serious difficulty reached the conclusion that in so far as the business in question related to the sale and delivery of the picture frames, it was certainly outside the scope and operation of the above mentioned clause of the Constitution of the United States. No customer of the portrait company agreed to purchase or was bound to take and pay for a picture frame unless he choose to do so after inspecting the portrait which he had ordered * * * The mere fact that at the time of ordering the picture, the customer may have reserved the right to select and buy a picture frame is of no consequence whatever * * * In no view of the matter could it be fairly said that a binding contract of any description relative to the purchasing of a picture frame existed between the company and any purchaser until a sale, negotiated in this State, was actually effected here. It was argued that a portrait and its frame were so intimately connected that both really constituted a unit or single thing. This may be quite true, after a portrait is placed in a frame; *but manifestly until this has been done, they are separate and distinct, each having its own independent commercial value, and the scheme of the very business under discussion distinctly recognizes that this is so.*"

An excellent discussion of this question will be found in the dissenting opinions of Judge Jones in State v. Coop, 52 S. C. 908; 41 L. R. A. 501 and in Laurense v. Elmore, 55 S. C. 477. The court in the main opinion in those cases held against our contention but the dissenting opinions are supported, it seems to us, by the better reason and authority. The main opinions in the two South Carolina cases, if of any value to plaintiff in error, are materially weakened by the dissenting opinions of Judge Jones.

On page 6 of the brief of plaintiff in error the following statement is made: "An order in which the purchaser agrees that the portrait is to be delivered in an appropriate frame, and a contract by the seller to deliver it in an

appropriate frame, and the frame having been manufactured in another state after the order was given and being especially made for, appropriate for, and fitted to the portrait in question, and the price having been agreed upon between the purchaser and maker as the factory price, make the negotiations and transactions interstate commerce. The fact that the purchaser may refuse to accept the frame because it is inappropriate or for any other reason does not deprive the transaction of its qualities of interstate commerce." This excerpt is not supported by the record. There was no "agreement" by the purchaser that the portrait should be delivered in an appropriate frame, nor a contract by the seller to so deliver it; but merely the expression in the customer's contract that he "understands" that the portrait "is to be" so delivered and practically the same reference to the frame in the contract of the company. Nor is there anything in Exhibit "A" or Exhibit "B" to indicate that the frame was manufactured in another State after the order was given, nor that the frame was made especially for the particular order; and we are utterly unable to see how counsel can, from the evidence, find any agreement between the parties relative to prices. There is a reference made to factory prices ranging from a smaller to a larger sum but certainly no *agreement* is thus laid on the purchaser to take one at the larger or the smaller price. If delivery should be made in a frame at a larger price it may be that the purchaser would prefer a cheaper frame and *vice versa*. Certainly there is nothing in the record which in the remotest degree places any obligation either on the seller to deliver the portrait in a frame or on the purchaser to accept the frame in which the delivery is made. The purchaser did not assume any obligation to take a frame and, therefore, the contract was complete upon the delivery of the portrait.

The effort of opposing counsel to distinguish the cases of State v. Montgomery and Chrystal v. Mayor, from the facts of this case, overlooks the main point of the contract

here involved. In the first case cited counsel state that some of the portraits were placed by the agent in frames sent him by the company, and in the Chrystal case that the selection was made by the purchaser from a stock of frames shipped from Illinois into Georgia. These particular features are immaterial. The purchaser did not order a frame in the present case nor in the cases cited. He had the right to reject or accept the frame in either of the cases. The fact that his selection in the case at bar was limited to the frame offered, and in the other cases that he was given the right to chose one of many frames is an incident, which can in no wise change the nature of the transaction from interstate to intra state commerce; and as showing that the courts do not regard this point as of any merit, we need only refer to the case of State v. Coop, supra, in which the court considered a contract which stated that the deliveryman would show a fine collection of frames from which the customer could purchase one at wholesale prices. The court there held that a portrait was not complete without a frame and that the frame might be properly regarded as a part of or incidental to the picture, and the case was tried upon the point that it did not fall either within the letter or the spirit of the statute against hawkers and peddlers, and it seems that the subsequent case of Laurens v. Elmore, 55 S. C. 477 was disposed of on the same point.

In the other case cited by counsel, Chicago Portrait Co. v. Mayer, 147 Fed. 967, the District Judge undertook to enjoin the City of Macon from enforcing a license tax on agents of the portrait company. The prayer of the bill was for an injunction to restrain and enjoin the City of Macon from arresting the agents of complainant who might be sent to Macon for the purpose of soliciting orders for pictures to be enlarged or who might be there for the purpose of delivering and collecting such pictures after they had been enlarged and returned for delivery. The Judge held that the agents who delivered the portraits after they were enlarged were not peddlers or hawkers, and

that they were engaged in interstate commerce. The last paragraph of the opinion refers to the sale of picture frames, and the Judge stated in substance *that it did not appear from the evidence that the delivering agents sold the frames,* and he did not hold that the agent could not be guilty of an offense on this theory, and merely referred to the case of State v. Coop, supra, and quoted that part of the opinion which held that "the sale of the frame was an incident to the business in which the company was engaged."

This review of the cases shows no direct and pointed holding against our contention by any court of last resort.

Stripped of all its technicalities, the transaction in this case resolves itself into a shipment of the picture frames by the manufacturer to its agent in another State there to be sold without any order from any person for such frames. In the cases of Machine Company v. Gage, 100 U. S. 676, and Emert v. Missouri, 156 U. S. 296, cases of this kind were considered, and this court held the agents liable in each case for the payment of the license tax. Those cases we submit determine the present case.

Several recent decisions of this court on the question of when the taxing power of the State begins, throw much light on this question. In American Steel & Iron Co. v. Speed, 192 U. S. 500, it appeared that a non-resident manufacturing corporation selected Memphis, Tenn., as a distributing point and selected a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse and make delivery in the *original packages* to the customers of the manufacturer either as expressly directed by it or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company. This court held that when the goods were stored in the warehouse they were no longer in transit, but had reached their destination and were held in the State for sale and were subject to taxation. It further appeared that salesmen of the Steel Company canvassed the territory of sev-

eral states adjacent to Tennessee and secured orders for nails and wire. The contract of sale did not specify the grade and quantity of the goods desired, which points were left open to be specified when the customer desired a delivery. When he desired to make his selection he notified the Steel Company and the goods were delivered, of the quality and of the class specified by him, and at prices named, in the contract. Thus it appears that the customer had the privilege of specifying during the life of the contract the kind of wire, nails or staples he desired delivered to him. These contracts were usually made before the goods arrived in Memphis, their point of destination; and generally the contracts were made in advance of the production of the goods at the factory. Large quantities of goods were then forwarded by rail or by water to the Patterson Transfer Co., at Memphis, where they were stored, and were reshipped to customers from time to time as and when they specified the character of goods desired. In addition to forwarding the goods out of Memphis in this manner it appeared that Memphis jobbers were permitted to make out their specifications, handing the same to the Patterson Transfer Company and the latter company delivered the goods specified in the order from the stock of goods on hand.

After reviewing the facts in detail Mr. Justice White said: "With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination in Memphis and were there held in store at the risk of the Steel Company to be sold and delivered after contracts for that purpose *were completely consummated.* All question therefore, as to the power of the State to levy the merchants' tax, based on the contrary contention, being without merit, may be put out of view." We have quoted at length from the facts of this case because of the close analogy they bear to those of the case at bar. But those facts present a much stronger case of interstate commerce than in the present case. It appeared that orders

were taken for the goods, the customer later had the right to specify during the life of the contract the kind of goods desired. And after the orders were taken and forwarded to the factory the goods were manufactured in sufficient quality to fill all of the orders which had been accumulated. The entire system of dealing in the two cases is much the same. If the American Steel Company and Wire Company was liable for the merchants' tax under the facts disclosed in that case, it is very certain that the agent of this Crayon Company was liable to the State of Alabama for a tax which was laid directly on selling picture frames.

It is well to note the facts in the case of Rearick v. Commonwealth of Pa. 203 U. S. 506. A municipal ordinance exacted a license for soliciting orders within the municipality. Rearick was employed by a foreign corporation to solicit orders for groceries, which the company filled by shipping goods to him for the delivery to and collection of the purchase price from the customer who had the right to refuse the goods if not equal to the sample, such goods always being shipped in distinct packages corresponding to the several orders except in the case of brooms, which after being tagged and marked *like the other articles according to the number ordered*, were then tied together in bundles for convenient shipment. "No shipments were made to the defendant (Rearick) except to fill such orders and no deliveries were made by him except to the parties named on the packages." In the course of the opinion Mr. Justice Holmes said : "The fair meanning of the agreed fact that the orders were given to agents employed to solicit them *is that the company offered the goods, and that the orders were acceptances of offers from the other side.* If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent *at the moment when the orders were given*, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. And further, "The brooms were *specifically appropriated to specific contracts* in a practical if not in a technical sense.

Under such circumstances, it is plain that wherever might have been the title, the transportation of the brooms for the purpose of fulfilling the contracts was protected commerce." And the ordinance was properly held invalid so far as it concerned Rearick.

The facts in the case of General Oil Company v. Crane, 209 U. S. 212 are practically the same as in the case of American Steel & Wire Company v. Speed. Here oil was shipped from Pennsylvania and Ohio, designated ultimately to points in the Southwest where it was stored in Memphis as a distributing point, and was held to be liable for a State tax while in Memphis.

The plaintiff in error relies upon the case of Caldwell v. N. C. 187 U. S. 622. In that case the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent on their arrival, and that the pictures, then for the first time, *were put into their proper frames.* Orders were taken by the agents in the first instance for the pictures *and the picture frames.* It no where appears, nor is it intimatetd by either counsel or by the court, that the purchaser was permitted to make a selection of a frame after the arrival of the picture; but, to the contrary the inference results from the facts stated that a specific order was taken for a specific character of frame. Under such facts, the transaction was, of course, interstate commerce. The case is quite different from the present one, and is not in the slightest degree opposed to our position.

Counsel for plaintiff in error make the contention that the statute violates section one of the Fourteenth Amendment of the Constitution in that it discriminates against the rights and privileges of citizens of other States. No authority is cited by counsel in support of this contention and we apprehend that none can be cited. The statute does not apply to merchants or dealers having a permanent place of business in this State and keeping picture frames as a part or all of their stock in trade. All persons

who have a permanent place of business in this State and keep picture frames as a part or all of their stock in trade come within the statute. Those merchants of this State who do not keep picture frames as a part or all of their stock in trade, but who solicit orders for picture frames are subject to the license, alike with agents of foreign corporations. And, said Judge Denson in the case at bar, "It is too clear for argument that any merchant whether he resides in the State or out of it, may be exempt from the license, provided he has a permanent place of business in the State and keeps picture frames as a part or all of his stock in trade." See also Emert v. Missouri, 156 U. S. 296.

But the Supreme Court of Alabama has construed the statute, as before pointed out, as not discriminating for or against any merchant or class of merchants, and this is conclusive on this court. As said with respect to a statute of the State of Tennessee, in American Steel & Wire Co. v. Speed, 192 U. S. 500, 523, "As that statute has been construed by the State court as applying to all merchants and as embracing alike all persons engaged in the character of business in which the Steel Company was carrying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination."

We respectfully submit that the judgment of the Supreme Court of Alabama should be affirmed.

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Attorney General.

THOMAS W. MARTIN,
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